a

THE BOARD OF TRUSTEES OF THE SABAH FOUNDATION & ORS

v.

DATUK SYED KECHIK SYED MOHAMED & ANOR & ANOTHER CASE (NO 3)

b

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[SUITS NOS: 351 OF 1979 & 352 OF 1979]
10 SEPTEMBER 1999

c

CIVIL PROCEDURE: *Interest - Compound interest - Whether prohibited under Civil Law Act 1956, s. 11 - Whether can be awarded in other circumstances - Whether can be awarded where fraud has been established - English common law and equity*

d

Judgment in Suit 352 for the sum of RM29,467,915 and Suit 351 for the sum RM10,375,504 were awarded to the plaintiffs earlier against the defendants with costs in both. The issues now before the court related to interest, *ie*, (1) the type of interest to be awarded, whether compound or simple, (2) the date from which the interest should run and (3) the rate of interest.

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Held:

[1] Section 11 of the Civil Law Act 1956 ('the Act') clearly shows that the court is not prohibited by anything from awarding compound interest. It is just that the section cannot be relied on as justifying the award of compound interest. Compound interest can be awarded and the law for it existed well before 1 December 1951. It remains to be examined under what other circumstances should it be awarded other than in the instance where "the accounting party has made profits and derived benefits by withholding the money." Where fraud has been established, compound interest can be awarded.

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[Order accordingly.]

Case(s) referred to:

A-G v. Alford (1855) 4 De GM & G 843 ***(refd)***

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Atwool v. Merryweather (1867) LR 5 Eq 464n ***(refd)***
Jones v. Foxall (1852) 15 Beav 388 ***(refd)***
Trengganu State Economic Development Corp v. Nadefinco Ltd [1982] 1 MLJ 365 ***(refd)***
Vyse v. Foster (1872) LR 8 Ch App 309 ***(refd)***

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Wallersteiner v. Moir (No 2) [1975] 1 All ER 849 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11(a), (b)

Other source(s) referred to:
Halsbury's Laws, 4th edn, vol 12(1), para 1131

For the plaintiffs - Alex Decena (Junior Koh with him); M/s Jayasuriya Kah & Co
For the defendants - Douglas Lind (Desmond Liaw with him); M/s Skinner, Lind, Willie, Wong & Chin

Reported by Farah Naim

JUDGMENT

Ian HC Chin J:

Introduction

On 6 September 1999 judgment in suit 352 was awarded for the plaintiffs against the defendants for the sum of RM29,467,915 and judgment was also in suit 351 awarded for the plaintiffs against the defendants for the sum of RM10,375,504 with costs in both. I left the question of interest to be argued on 8 September. The issues relating to the interest to be awarded concern (1) the type of interest, that is whether compound or simple, (2) the date from which the interest ought to run and (3) the rate of interest. I turn now to consider the legal principles governing the award of interest.

Legal Principles

Mr. Douglas Lind, learned counsel for the defendants for both suits, contended that compound interest cannot in any event be awarded because of the prohibition in s. 11 of the Civil Law Act 1956 (the Act) which reads:

> In any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section:

(a) shall authorise the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

Further contended by Mr. Douglas Lind was that only the common law and rules of equity of England existing on 1 December 1951 shall apply and thus any English cases decided after that date should not be relied on. Learned

counsel then distinguished *Trengganu State Economic Development Corpn. v. Nadefinco Ltd.* [1982] 1 MLJ 365 as being a case coming under s. 11(b) being compound interest agreed under an agreement between the parties. That case concerns the agreement in the form of several letters of a defendant to pay interest at 11% per annum. The argument there was concerned whether the interest should be compounded and the defendant there relied on s. 11(a) of the Act as preventing the award of compound interest. Salleh Abas FJ (as he then was) sitting as a High Court judge said this, at p. 368, when dealing with that contention, *viz.*:

> The short answer to that submission is that the interest chargeable in this case is not based on the statutory discretion given to the court under section 11 of the Civil Law Act, or under any other Act, but upon the agreement of the parties as evinced in exhibits P2, P3 and P4. Furthermore the language of section 11 itself leaves no room for doubt that in cases not covered by the section the court is not prohibited from giving interest upon interest. The fact that the court is not authorised does not mean that it is prevented from doing so. What therefore is the principle upon which the plaintiffs could claim the calculation of interest at rests?
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> …
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> It is therefore obvious that as a matter of law compound interest could be allowed by the court if there are circumstances showing that the accounting party has made profits and derived benefits by withholding the money. This principle was reaffirmed by Lord Hatherly L.C. in *Burdick v. Garrick* as being a sound principle.

That passage, in my view, clearly shows that the court is not prohibited by anything in s. 11 of the Act from awarding compound interest. It is just that the section cannot be relied as justifying the award of compound interest. In so far as the dateline of 1 December 1951 is concerned for the reception of English common law and rules of equity, the case of *Burdick v. Garrick* clearly shows that the law already existed in 1868 or 1869. It appears to me that the principle allowing compound interest stem from other cases of that period, like *Jones v. Foxall* [1852] 15 Beav 388, *Attorney-General v. Alford* [1855] 4 De G M & G 843, *Vyse v. Foster* [1872] LR 8 Ch App 309 and *Atwool v. Merryweather* [1867] LR 5 Eq 464n.

Therefore, compound interest can be awarded and the law for it existed well before 1 December 1951. It remains to be examined under what other circumstances such should be awarded other than the instant where "the accounting party has made profits and derived benefits by withholding the money" (*Trengganu State Economic Development Corpn. v. Nadefinco Ltd.*).

In *Wallersteiner v. Moir (No. 2)* [1975] 1 All ER 849 CA a director misused the fund of the company and he was ordered to pay compound interest. Lord Denning MR there said that "a person in a fiduciary position is not allowed

to make a profit out of his trust; and, if he does, he is liable to account for that profit or interest *in lieu* thereof." He also said that where a company was deprived of is money which it need to use for its business it should be compensated by compound interest to account for the inflation. Mr. Lind argued that compound interest is only awarded, relying on Buckley LJ, at p. 863, "if it is established that he has used the money in trade" for which, learned counsel argued, there was no evidence to suggest that DSK had so used. But, as Lord Denning MR, had said and I would follow, it should be presumed that DSK or Banita made the most beneficial use of the money and it was for them to establish otherwise for which they have failed to do so. In fact Buckley LJ at p. 864 also made that presumption.

Mr. Alex Decena, learned counsel for the plaintiffs, had contended that where fraud has been established compound interest can be awarded which proposition of law I would agree as it is supported by *Halsbury's Laws*, 4th edn, vol. 12(1) para 1131 which says:

> Under its equitable jurisdiction, the court has the ability to award interest as ancillary relief to its equitable remedies, such as taking an account, specific performance and rescission. The jurisdiction permits the court to award either simple or compound interest. The latter form of interest will be awarded in appropriate cases, such as where an allegation of fraud has been made good or where it has been misused by a fiduciary.

Suit 352

Mr. Lind then submitted in relation to suit 352 that (1) there was no misuse of funds and (2) the defendants never utilised any of the profits for trade or for making profit. As for contention (1) the evidence clearly showed that the asset in the form of the Wallace Bay area was taken by DSK and Banita and that constituted the fund or asset of the plaintiffs and DSK and Banita had used it to their own benefit. That is clearly misuse. As for contention (2) it consisted of two parts, one relation to RM6,417,915 and the other to the sum of RM23.05 million. Mr. Lind contended that the first sum represented the unutilised profit remaining in the bank account or that it was taken by TM while the second sum represented the damages arising from the cancellation of the licence which the defendants did not have the opportunity to realise any profit therefrom. For a certain period, the accounts of Banita showed that a certain sum was placed in a bank account but the accounts also showed that sum around RM10 million was paid to DSK. Therefore, payment to DSK or for that matter to TM was certainly for a purpose. It must have been pursuant to certain commercial transaction. Thus it cannot be denied that it was profitable to DSK. It can also be presumed that it must have been profitable to DSK and Banita for the money to have been allegedly paid to TM. There is no merit in relation to contention concerning the sum of RM6,417,915. Whatever it is, fraud was established justifying the award of compound interest and Mr. Douglas Lind did not advance any argument to get round this point.

However, there is substance in the contention in his similar submission concerning the sum of RM23.05 million since it represented damages as a result of the cancellation of the licence and therefore there can be no question of that sum having been utilised or put to profitable use.

As for the rate of interest, I was not addressed and I could not do any better than award the rate of 8%. It was in order to avoid further litigation or argument that I did not follow the formula in *Wallersteiner v. Moir* which awarded the rate of 1% above the official bank rate or minimum lending rate in operation from time to time since that formula would involve investigation as to what the official bank rate was over a very long period of time which may not yield the data required.

The time from which interest should run should not be later that the date the money was already in the hands of Banita. The 1978 account showed that the money was already in the hands of Banita. Thus, I will take 1 January 1978 as the date which interest should begin to run.

Therefore, in respect of suit 352, compound interest at 8% per annum, that is at yearly rests, on the sum of RM6,417,915 is awarded. The interest is to run from 1 January 1978 until payment. As for the sum of RM23.05 million it will carry interest at 8% per annum from the date of judgment (6 September 1999) until payment. I turn now to suit 351.

Suit 351

The sum of RM10,375,504 awarded was the profit in the form of the enhancement of Zara Land which was acquired by the government but which compensation was never paid and therefore there is no question of the defendants having put the money to use. However, the compensation award carries interest at 6% per annum from 20 December 1976. I would therefore award simple interest at 6% per annum on the sum of RM10,375,504 from 20 December 1976 until the date of judgment, 6 September 1999 and thereafter interest at the statutory rate until payment.

Delay

It was urged by the defendants that the plaintiff had delayed the prosecution of these suits by about nine years and that the period should be discounted. I am of the view that I was not of that conclusion when I dismissed the application of the defendants to strike out the two suits for want of prosecution. In fact the Federal Court ([1999] 1 MLJ 258) was also of the conclusion that I was of the view that the plaintiffs are not to be blamed for the delay.

Costs

Costs to the plaintiffs in both suits in relation to these further proceedings concerning the award of interest.